No. 14,733

United States Court of Appeals
For the Ninth Circuit

BERT STRAND, Sheriff of San Diego County, State of California,
Appellant,

vs.

WILLIAM SCHMITTROTH,
Appellee.

APPELLANT'S PETITION FOR A REHEARING EN BANC.

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To the Honorable Judges Healy, Bone and Chambers of the United States Court of Appeals for the Ninth Circuit:

Appellant petitions this Honorable Court for a rehearing *en banc* in the above entitled matter.

This petition is made on the ground that this case involves important questions of federal-state relations which have received different treatment in different United States Courts of Appeal and should receive the attention of the whole Court.

FACTS.

The District Court ordered a federal probationer released from the sheriff. The sheriff was detaining

the probationer for trial in the state court. No objection by a representative of the federal government has ever been made in the state court.

ARGUMENT.

I.

THE OPINION OF THE MAJORITY FOSTERS A RUDE CLASH BETWEEN JURISDICTIONS BY PERMITTING THE RELEASE OF A PRISONER IN STATE CUSTODY. THE DOCTRINE OF COMITY WAS DESIGNED TO AVOID SUCH CONFLICT.

A. The majority has either misstated, or appellant has not made his view involving comity clear.

The Court states: "Appellant argues that the state court does have jurisdiction to try appellee while he is a federal probationer *unless* the federal court *or* appropriate federal authorities object to exercise of state jurisdiction over the accused." This is, in part, a correct statement of our views. However, this contention was supplemented with the statement on page 8 of Appellant's Brief as follows: "The orderly administration of justice would seem to require the proper agent of the first sovereign to object in the Court of the second sovereign."

It has been, and is, the view of the appellant that the second court, in this case the state court, having jurisdiction of the person, may proceed unless there is an objection on behalf of the federal court, *which is made in the state court.* Only then must the second court, as a matter of comity, decline to exercise its jurisdiction.

At the core of our contention lies the question of consent and the manner and procedure by which the first sovereign may enter its objection. We contend that the second court has the right to assume consent in the absence of an express objection by the first sovereign in the tribunal of the second sovereign.

The rule of comity which requires the objection to the jurisdiction of the second court to be made in the second court, and which leaves to the second court the power to decline to exercise its jurisdiction, was designed to prevent the very thing which occurred in the present case. The rule of comity was designed to promote conciliation and harmony, rather than alienation and discord between tribunals. The requirement that the objection by the first sovereign be made in the tribunal of the second sovereign operates to bring about this harmony in two ways: (1) It gives the second sovereign the right to pass upon the question of whether it should decline as a matter of comity to exercise its jurisdiction; and (2) It prevents the peremptory release of the prisoner of the second sovereign by the first sovereign.

The writ of habeas corpus has never been used to enforce a rule of comity. The writ of habeas corpus is not a proper procedure to review the application or the failure to apply the rule of comity when a second court has acquired jurisdiction. (*U. S. v. Morse,* 267 U.S. 80, 82; *Stamphill v. Johnston,* (9th Cir.) 136 F.2d 291, 292; *U. S. v. Marrin,* 17 F.2d 476, 479-480.)

We have also contended that the petitioner has a right of appeal from the lower state courts to higher state courts. Likewise, he has the right of appeal from the state court to the United States Supreme Court. The writ of habeas corpus was not designed to prevent a state court from acting correctly or incorrectly in the exercise of its jurisdiction.

This contention is apparently answered by the majority opinion with the case of *Bowen v. Johnston,* 306 U.S. 19, 26-27 (1939). In the *Bowen* case at page 23 the court stated: "the scope of review on habeas corpus is limited to the examination of the jurisdiction of the court whose judgment and conviction is challenged". This supports our contention that the writ of habeas corpus was not designed to enforce a rule of comity but is limited to situations where a second court is without jurisdiction.

Furthermore, in the *Bowen* case, both the trial tribunal and the habeas corpus tribunal were Federal District Courts. This is important, because of the policy Congress has expressed at 28 U.S.C. 2254, which requires exhaustion of state remedies. Such doctrine is not a statutory requirement in federal cases. However, it should be noted that the procedure followed in *Bowen v. Johnston* is no longer proper even in the federal court. The petitioner would be first required to file for relief under 28 U.S.C. 2255, thus giving the trial court an opportunity to pass on the question before habeas corpus would be available in the second federal court.

In present case no objection by a representative of the federal government was made in the state court.

B. The majority opinion leaves unsolved the problem of assumed consent and gives the State Courts no guidance among conflicting federal cases on this question.

It has been appellant's view that the District Court erred by refusing to give any consideration to the fact that the federal government had not entered an objection *in the state court* over the petitioner. We have urged the view followed by the Second Circuit. The case of *U. S. ex rel. Pasela v. Fenno,* 167 F.2d 593, 596, held that in the absence of an objection expressed by the first jurisdiction in the tribunal of the second jurisdiction the second jurisdiction may assume the consent of the first jurisdiction. Such a rule is a common sense element of the rule of comity involved in the present case. Any other rule would compel the State to inquire whether each prisoner is a federal probationer; in view of the enormous number of prosecutions in state courts every year the administrative burden of such a requirement would be enormous. The rule of comity permits, and common sense demands, that the second jurisdiction assume the consent of the first jurisdiction in the absence of an express objection by the first jurisdiction in the tribunal of the second jurisdiction.

C. The majority opinion draws an incorrect conclusion from its finding that the probationer has standing to raise and rely on the rule of comity, that the first sovereign acquiring jurisdiction is entitled to retain jurisdiction.

The court concludes that the appellee has the standing to raise the question of exercise of state court jurisdiction over him. Even assuming that appellee has the right in some manner, including habeas corpus, to bring to the attention of the court the fact that the proceedings have been commenced against him in a state court, nevertheless it does not follow that the federal court should interfere with the state court's jurisdiction and decide whether the state court should or should not apply the rule of comity. The rule of comity demands that the objection to the second court's jurisdiction be made in the tribunal of the second court. The proper procedure for the federal court when it has been brought to its attention, in whatever manner, that the state court is proceeding against the probationer, is to enter an express objection in the state court. In the absence of said express objection, the state court is entitled to assume consent to its jurisdiction.

No objection by the federal court or a representative of the federal court was ever made in the state court.

II.

IF THE MAJORITY OPINION IS BASED ON THE GROUND THAT THE STATE LACKS JURISDICTION OVER A PROBATIONER, IT HAS CREATED AMBULATORY ENCLAVES WHO ARE FREE FROM ANY DETENTION BY STATE OFFICERS ACTING AS STATE OFFICERS, INCLUDING DETENTION INCIDENT TO ARREST FOR ANY CRIME AGAINST THE PEOPLE OF THE STATE.

The majority opinion states that the same result obtains, either on the theory of comity between federal and state courts, or on the theory of federal supremacy. The latter theory would effectively deprive the state and any of its officers from enforcing any of its laws against a federal probationer. For if the lower state court is without jurisdiction and the sheriff in the instant case is powerless to detain the probationer, then all state officers are powerless to prevent and to detain any probationer for violating any state law, since probationer is in *custodia legis* of the Court of the United States. Such a result is neither desirable nor necessary. The majority opinion is in conflict with numerous other decisions which disclaim the theory that the state court is without jurisdiction in the present situation.

In the case of *U. S. ex rel. Pasela v. Fenno,* 167 F.2d 593, the Second Circuit expressly declined to follow the holding of decision of *Grant v. Gurnsey* (10th Cir.), 53 F.2d 163, insofar as it held that the second court, assuming jurisdiction, lacks jurisdiction. To like effect is the case of *U. S. ex rel. Spellman v. Murphy* (7th Cir., 1954) 217 Fed.2d 247. Also see, *Hebert v. Louisiana,* 272 U.S. 312, 315; *Werntz v. Looney* (10th Cir.), 208 F.2d 102; *Rahls v. U. S.* (10th Cir.), 166

F.2d 532; *U. S. v. Farrell* (8th Cir.), 87 F.2d 957; *People ex rel. McCarthy v. Reagan,* 58 N.E.2d 872 (389 Ill. 172); *Wilkinson v. Youell,* 23 S.E.2d 356 (180 Pa. 321).

The majority apparently concedes that the state court is not without jurisdiction unless the federal authorities object. It should appear clear that the State, according to the present case, has jurisdiction since no objection has been made to its jurisdiction in its tribunal. We have pointed out above the discord and the disorderly state of affairs created by the use of the writ of habeas corpus to enforce such a rule prior to any objection by an agent of the federal government made in the state court.

The court in an attempt to justify the use of a writ of habeas corpus has relied on the case of *In re Neagle,* 135 U.S. 1. The rationale of that decision is that the marshal was an instrumentality and agent of the federal government. It is hoped that by this citation the majority is not making the probationer an instrument or agent of the federal government.

Likewise, the court has completely failed to answer our contention that the District Court was without power under Section 2241, Title 28 of the United States Code to grant the writ of habeas corpus to petitioner.

CONCLUSION.

It is respectfully submitted that the petition for rehearing *en banc* be granted.

Dated, San Francisco, California,
June 1, 1956.

Respectfully submitted,

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CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellee and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing en banc is well founded in point of law as well as in fact and that said petition for a rehearing en banc is not interposed for delay.

Dated, San Francisco, California,
June 1, 1956.

ARLO E. SMITH,
Deputy Attorney General of the State of California,
Of Counsel for Appellant and Petitioner.

No. 14733

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vs.

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Appellee.

BRIEF OF AMICUS CURIAE.

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Certificate of Counsel.

I hereby certify that I am of counsel for appellee and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing en banc is well founded in point of law as well as in fact and that said petition for a rehearing en banc is not interposed for delay.

Dated, San Francisco, California,
June 1, 1956.

Arlo E. Smith,
Deputy Attorney General of the State of California,
Of Counsel for Appellant and Petitioner.